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A Twisted Mosaic: The Ninth Circuit's Piecemeal Approval of Environmental Crime in *Kasza v. Browner*

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A TWISTED MOSAIC: THE NINTH CIRCUIT'S PIECEMEAL APPROVAL OF ENVIRONMENTAL CRIME IN *KASZA V. BROWNER*

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I. INTRODUCTION

In 1995, President Clinton stated that as a nation, "[o]ur greatness is measured not only in how we so frequently do right, but also how we act when we have done the wrong thing, how we confront our mistakes, make our apologies, and take action."[1] While this rhetoric may be inspiring, the results of *Kasza v. Browner*[2] and *Frost v. Perry*[3] indicate that the standards used to measure the criminal actions of the United States government fall short of greatness. These standards, supposedly in the interest of national security, create a mosaic of logic that skews the scales of justice away from finding government accountability and towards condoning criminal activity.

The *Kasza* and *Frost* cases concerned attempts by plaintiffs "to compel compliance with hazardous waste inventory, inspection, and disclosure responsibilities."[4] Both cases culminated in appeals to the United States Court of Appeals for the Ninth Circuit.[5] The two cases, consolidated on appeal, employed different methods of attack.[6] However, both failed after running headlong into the state secrets privilege and an executive order exempting the Air Force from complying with Environmental Protection Agency ("EPA") requirements.[7] It is also important to note that these cases are not only on behalf of named plaintiffs but that they are also joined by an unnamed number of "John Doe" plaintiffs who cannot publicly admit to working at the Air Force base in question since they would be in

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[1]Press release, George Washington University, Office of University Relations (October 12, 1995). Released in conjunction with compensation for victims of prior military casualties in radiation experiments and production.

[2]Kasza v. Browner, 902 F. Supp. 1240 (D. Nev. 1995).

[3]Frost v. Perry, 161 F.R.D. 434 (D. Nev. 1995).

[4]Kasza v. Browner, 133 F.3d 1159, 1162 (9th Cir. 1998).

[5]*See id.*

[6]*See id.*

[7]Presidential Determination No. 95-45, 60 Fed. Reg. 52, 823 (Oct. 10, 1995).

violation of an employment secrecy oath, punishable by a ten-year prison sentence.[8] This level of secrecy also led to the sealing of an office belonging to Jonathan Turley, the attorney for both plaintiffs; "[the] office remains sealed by federal court order—students and others are not allowed to enter because the government says Turley's files hold documents that are classified."[9] In *Kasza*, the United States Court of Appeals for the Ninth Circuit held that this was not an "abuse of the [state secrets] privilege."[10]

The *Frost* case developed as the widow of Robert Frost attempted to gather information regarding which substances her husband had been exposed to during his employment at the Air Force base. Frost died in 1989 of cirrhosis of the liver.[11] Examination of his fatty tissue revealed "unusually high levels of dioxins and other carcinogens"[12] and "high amounts of dioxin and dibenzofurans, plastic- and solvent[-]based chemicals taken into the body via smoke inhalation."[13] While the liver ailment was not the sole cause of Frost's death, a biochemist stated that "exposure to the chemicals could have accelerated its progress, resulting in premature death."[14] Frost and the additional unnamed plaintiffs initiated a citizen suit alleging violations of the Resource Conservation and Recovery Act of 1976 ("RCRA").[15] Frost's widow did not seek monetary damages, but rather sought "a declaration that the Air Force failed to perform duties required by RCRA, injunctive relief to restrain the Air Force from incinerating and transporting hazardous wastes in the vicinity of the operating location, civil penalties, and attorney's fees."[16]

The *Kasza* action was initiated against the EPA based upon a violation of RCRA requirements.[17] Both Kasza and Frost suffered from a variety of illnesses "that took the form of constant respiratory distress and a painful skin condition" commonly referred to by workers as "fish scales."[18] Both alleged that their illnesses could be attributed to a policy of waste removal that could only be labeled as crude, at best:

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[8] *60 Minutes* (CBS television broadcast, March 17, 1996).

[9] Richard Leiby, *Secrets Under the Sun*, THE WASHINGTON POST, July 20, 1997, at F1.

[10] *Kasza*, 133 F.3d at 1170 n.9.

[11] Margaret A. Jacobs, *A Secret Air Base Hazardous Waste Act, Workers' Suit Alleges*, WALL ST. J., Feb. 8, 1996, at A1.

[12] *Id.* at A1.

[13] Jason Vest, *Alien Toxins*, 44 VILLAGE VOICE 45, 45 (Nov. 16, 1999).

[14] Jacobs, *supra* note 11, at A1.

[15] 42 U.S.C. § 6972 (1976).

[16] Kaza v. Browner, 133 F.3d 1159, 1163 (9th Cir. 1998).

[17] Kasza v. Browner, 902 F. Supp. 1240, 1240 (D. Nev. 1995).

[18] Vest, *supra* note 13, at 45.

> ...[C]lassified materials were burned at least once a week in 100-yard-long, 25-foot-wide pits. With security guards standing at the edge, Air Force personnel threw in hazardous chemicals such as methylethylketone...computers... drums of hazardous materials trucked in from defense facilities in other states...ignited [them] with jet fuel and typically burned [them] for eight to 12 hours.[19]

Kasza's widow sought a "declaration that [the] EPA has failed to perform acts and duties required by RCRA, ...an injunction prohibiting it from violating RCRA's mandatory requirements[,] ...and costs of litigation."[20]

In *Frost*, the United States District Court for the District of Nevada granted summary judgment in favor of the Air Force, "[f]inding that the state secrets privilege invoked by the Secretary of the Air Force made discovery and trial impossible[.]"[21] This was true because "the Air Force refused to furnish almost all the information requested," and after invoking the state secrets privilege, it supported these denials with classified and unclassified declarations available only to the court for *in camera* review.[22] Subsequently, the United States Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment.[23]

The same district court also dismissed *Kasza* "as moot, since inventory and inspection activities were carried out after the action was filed."[24] In addition, the President exempted the operating location near Groom Lake "from any hazardous waste provision that would require disclosure of classified information to any unauthorized person[s]."[25] The court did not grant summary judgment to the EPA, however, on the claim that it violated the public disclosure requirements of the RCRA.[26] The court reasoned that the Act "itself provides no exception for disclosure of classified information," but does allow for Presidential exemption of filing such reports.[27] After allowing time for the EPA to obtain such a grant, the court denied injunctive relief to Kasza.[28] The United States Court of

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[19]Jacobs, *supra* note 11, at A1.
[20]*Kasza*, 133 F.3d at 1164.
[21]*Id.* at 1162.
[22]*Id.* at 1163.
[23]*Id.* at 1176.
[24]*Id.* at 1163.
[25]*Id.* at 1163.
[26]*Kasza*, 133 F.3d at 1164.
[27]*Id.* at 1164.
[28]*Id.*

Appeals for the Ninth Circuit affirmed the judgment of the district court, although it remanded for reconsideration the award of plaintiff's fees and the rationale for a sealing order.[29]

Upon appeal to the United States Court of Appeals for the Ninth Circuit, the *Frost* and *Kasza* cases were consolidated, although the parties continued their litigation along different routes.[30] The points of interest in Frost's appeal for purposes of this article are threefold. First, "Frost argue[d] that the entire regulatory subject matter of a RCRA enforcement action [could not] be a state secret."[31] Frost's second claim was that the state secrets privilege "was overbroad and could not properly bar all material discovery."[32] Finally, Frost maintained that the Secretary of the Air Force did not properly review all of the material necessary to validate the use of the state secrets privilege.[33]

Kasza's appeal contained three central issues as well.[34] First, Kasza argued that the validity of the EPA's "piggy-backing" on the Air Force's use of the state secrets privilege should be reviewed.[35] Second, Kasza disagreed with "the district court's permitting [the] EPA to rely on privileged information...[while] denying her access to the material."[36] Lastly, Kasza questioned the validity of the Presidential exemption.[37] While the court dealt with the issues on appeal individually, it seems most beneficial to look to the broad strokes of the court's action as applied to both cases. Essentially, the court allowed the Government to use the state secrets privilege to prevent a vigorous review of the Air Force's mosaic theory, and then bolstered that action by validating the retroactive Presidential exemption.

II. THE STATE SECRETS PRIVILEGE

The *Frost* and *Kasza* appeals failed for reasons related, at least in part, to the state secrets privilege. "The state secrets privilege is a common law evidentiary privilege that allows the government to deny discovery of military secrets."[38] This privilege is a relative of the *Totten*[39] doctrine—a two-pronged theory which originally "stood

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[29] *Id.* at 1175-76.
[30] *See id.* at 1164-65.
[31] *Id.* at 1165.
[32] *Kasza*, 113 F.3d at 1165.
[33] *See id.*
[34] *See id.* at 1171.
[35] *Id.* at 1171.
[36] *Id.* at 1171.
[37] *Id.*
[38] Kasza, 133 F.3d at 1165.
[39] Totten Adm'r v. United States, 92 U.S. 105 (1875).

for the proposition that the courts of the United States lacked jurisdiction to hear complaints against the United States brought by parties who alleged that they entered into contracts for secret services with the national government."[40] It is the second prong of the *Totten* doctrine that seemingly gave rise to part of the state secrets privilege:

> It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not al low the confidence to be violated.[41]

The United States Supreme Court espoused the proper use of the fully developed state secrets privilege in *United States v. Reynolds*:[42]

> The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.[43]

Once these criteria are met and the court has determined that there was "a reasonable possibility that military secrets were involved,"[44] then "the claim of privilege will be accepted without requiring further disclosure."[45]

There are few limitations to this privilege, but those that do exist are crucial to the *Kasza* case. The term "'state secrets' is amorphous in nature, it should be defined in light of 'reason and experience,'..., *i.e.* a 'generic concept of broad connotations, referring to the military and naval establishments and the related

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[40]Sean C. Flynn, *The Totten Doctrine and its Poisoned Progeny*, 25 VT. L. REV. 793 (2001).

[41]*Totten*, 92 U.S. at 107.

[42]345 U.S. 1 (1953).

[43]*Id.* at 7-8.

[44]*Id.* at 10-11.

[45]*Id.* at 9.

activities of national preparedness'."[46] Because of the elusive and often changing nature of what actually constitutes a state secret, courts have typically given broad discretion in allowing such an assertion.[47] One such formulation of that discretion is that:

> [T]he trial judge should insist (1) that the formal claim of privilege be made on public record and (2) that the government either (a) publicly explain in detail the kinds of injury to national security it seeks to avoid and the reason those harms would result from revelation of the requested information, or (b) indicate why such an explanation would itself endanger national security.[48]

However, "whenever possible, sensitive information must be disentangled from non-sensitive information to allow for the release of the latter."[49] This "disentangling" may be accomplished by *in camera* review of materials submitted by the party invoking the privilege, and then the final determination will rest with the court's review of those materials.[50]

Three possible effects may result upon a finding that the state secret privilege is properly invoked. First, the evidence may be completely removed from the case and the case will go forward without that evidence.[51] If the plaintiff cannot establish the prima facie elements of the claim, then the case may be dismissed.[52] Second, "if the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim," then summary judgment may be granted to the defendant.[53] The final effect may occur when the subject matter of the case itself involves a state secret.[54] In that instance the action should be dismissed "solely on the invocation of the state secrets privilege."[55]

Obviously, the results of properly invoking the privilege are harsh and could be dispositive of any claim. This result is rationalized by the fact that "the results are harsh in either direction

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[46]Jabara v. Kelley, 75 F.R.D. 475, 483 n.25 (E.D. Mich. 1977) (citations omitted).

[47]*Id.*

[48]Ellsberg v. Mitchell, 709 F.2d 51, 63-64 (D.C. Cir. 1983).

[49]*Id.* at 57.

[50]*See generally Id.*; *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998).

[51]*Kasza*, 133 F.3d at 1166; *see also* United States v. Reynolds, 345 U.S. 1, 11 (1953).

[52]*Kasza*, 133 F.3d at 1166.

[53]*Id.*

[54]*Id.*; *see also Reynolds*, 345 U.S. at 11; Totten Adm'r v. United States, 92 U.S. 105, 107 (1875).

[55]*Kasza*, 133 F.3d at 1166; *see also Reynolds*, 345 U.S. at 11; *Totten*, 92 U.S. at 107.

and the state secret doctrine finds the greater public good—ultimately the less harsh remedy—to be dismissal."[56] Whether or not the "greater good" takes into account the long-term effects of environmental damage, much less the effects of human damage, is an issue yet to be discussed.

III. THE MOSAIC THEORY

The mosaic theory is not a judicial creation, but rather an explanation that the government typically offers as the basis for invocation of the state secrets privilege. This theory is an explanation "that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair."[57] The basis of the theory is that by compiling bits and pieces of data concerning a given subject, foreign intelligence would be able to piece together information as to how the whole subject operates.[58]

As the theory works, "if seemingly innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the government to disentangle the information from other classified information."[59] According to Air Force Secretary Sheila Widnall, "[C]ollection of information regarding the air, water and soil is a classic foreign intelligence practice... because analysis of these samples can result in the identification of military operations and capabilities."[60] It is this reasoning that prevents the admission of any evidence by the plaintiffs and "puts the government in the Orwellian position of trying to keep secret a 40,000-acre complex where airplanes and buses full of workers arrive every day."[61]

IV. PRESIDENTIAL EXEMPTION

The RCRA allows for presidential exemptions for "any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance... if he determines it to be in the paramount interest of the United States to do so."[62] The only statutory limitation on this power arises when such an exemption is due to a lack of appropriation of funds when the

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[56]Bareford v. Gen. Dynamics Group, 973 F.2d 1138, 1144 (5th Cir. 1992).
[57]Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978).
[58]*Id.*
[59]*Kasza*, 133 F.3d at 1165.
[60]Leiby, *supra* note 9, at F1.
[61]*Id.* at F1.
[62]42 U.S.C. § 6961 (2001).

President has not made a request for such funds.[63] While the President has the power to provide such an exemption under the RCRA, such power is in conflict with case law relating to presidential orders since executive orders cannot be used to protect evidence of criminal activity.[64]

In arriving at a judgment in the *Frost* and *Kasza* appeals, the court did not discuss concealment of environmental crime. There is, however, some discussion of whether the state secrets privilege and the RCRA exemption can be used simultaneously.[65] This issue is relevant because if the RCRA preempts the state secrets privilege, then no discovery material would have been barred in Frost's appeal.[66] The court resolved this issue by stating that in such a situation, "'statutes which invade the common law...are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'"[67] Therefore, the statutory purpose of the RCRA's presidential exemption may serve to allow protection of state secrets because "[a]t times the purposes of the privilege and the exemption may overlap,"[68] even though the state secrets privilege and the presidential exemption are intended to serve different purposes.[69]

As the Air Force had not received an exemption from the RCRA's requirements for numerous years preceding the presidential exemption,[70] they presumably could only rely upon the state secrets privilege to protect the environmental data for that un-exempted time period. Nonetheless, the court declined "Kasza's invitation to remand for the district court to determine the status of regulatory information for prior, unexempted years."[71] The court reasoned that since "[it] ha[d] already concluded that 'remedial' relief of the sort requested is moot, remand would be pointless."[72]

V. THE THEORIES AT WORK

The court dealt with the *Frost* appeal by first discussing the state secrets privilege and the existence of the presidential exemption

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[63] *Id.*

[64] United States v. Nixon, 418 U.S. 683 (1974).

[65] *Kasza*, 133 F.3d at 1167-68.

[66] *Id.* at 1165.

[67] *Id.* (quoting United States v. Texas, 507 U.S. 529, 534 (1993) (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952))).

[68] *Kasza*, 133 F.3d at 1168.

[69] *Id.* at 1167.

[70] Presidential Determination No. 95-45, 60 Fed. Reg. 52, 823 (Oct. 10, 1995).

[71] *Kasza*, 133 F.3d at 1174.

[72] *Id.* at 1174.

for waste disposal standards in 42 U.S.C. §6961.[73] The court noted that the two privileges existed for different reasons. The states secret privilege is an evidentiary privilege that allows the government to protect classified information during litigation. The presidential exemption exists to permit the President to exempt federal facilities from compliance with the RCRA if he believes it is in the best interests of the United States to do so.[74] As these privileges have different purposes, and are not in conflict with or exclusive of one another, the court saw no issues of preemption, and thus, no conflict.[75] Interestingly, the court offered scenarios in which the state secrets privilege and the RCRA exemption would not co-exist, but indicated that the result would likely be the same that the case would be dismissed.

> [I]f a facility has been exempted... a citizen's suit could question whether the exemption was in the paramount interest of the United States, to which the exemption itself would not apply but to which the state secrets privilege might. Likewise, if a facility hasn't been exempted, but the suit could otherwise go forward based on publicly available inventory and inspection reports and testimony, it might still be the case that disclosure of discrete items of relevant information would affect the national interest.[76]

However, the court's discussion of the manner in which the government asserted the state secrets privilege was not handled as deftly. The main requirement of the state secrets privilege is straightforward: a formal claim of privilege by the head of the department that has control over the matter must exist. In this instance, the Secretary of the Air Force properly made such a declaration.[77] The court upheld the use of classified and unclassified materials made available to the lower court as a proper invocation of the state secrets privilege.[78] However, it seems that the court did not reasonably consider the actual content of the materials with which Frost was concerned.

By applying the mosaic theory, the Air Force was able to deny the existence of *any* item requested by Frost, regardless of the likelihood of it being a rational state secret. Items such as common

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[73] *Id.* at 1167.
[74] *Id.*
[75] *Id.*
[76] *Id.* at 1168.
[77] Kasza, 133 F.3d at 1167.
[78] *Id.* at 1169.

household paint, car batteries, and jet fuel were deemed "top secret."[79] This seems to blatantly ignore the *Reynolds* requirement of disentangling the sensitive from the non-sensitive.[80]

The Secretary of the Air Force commented on the mosaic theory and why such precautions are taken: "Collection of information regarding the air, water, and soil is a classic foreign intelligence practice because analysis of these samples can result in identification of military operations and capabilities[.]"[81] While there is no reason to dispute the accuracy of the Secretary's statement, it seems that the mosaic theory can be expanded to cover any possible item under its rubric. "Acknowledging that a large military base has trichloroethylene is like saying that a cleaning crew has ammonia. It would hardly be cause for celebration in the Russian intelligence services."[82] Nonetheless, the court found that the state secrets privilege and the use of the mosaic theory were valid.[83] Moreover, the court added the refrain from the *Totten* doctrine that any further action by Frost would be barred because the subject matter of the action is a state secret and "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."[84] The court chose not to discuss exactly which "public policy"[85] it believed was at work; assumedly the policy was a vague and elusive implication related to national security. The court merely indicated that it accepted the district court's determination that the action be dismissed as "further proceeding in this matter would jeopardize national security,"[86] notwithstanding the fact that the only evidence considered by the district court was Secretary Widnall's assertion of the state secrets privilege.[87]

The *Kasza* appeal focused its attention on whether all of the claims presented were moot. The court determined they were moot because of the procurement of the presidential exemption.[88] In addition to the denied requests for injunctive and declaratory relief, Kasza also requested public disclosure of the reports at issue.[89] These

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[79] *60 Minutes* (CBS television broadcast, March 17, 1996).
[80] *Id.*
[81] Jacobstein, *supra* note 11, at A1.
[82] *Id.* at A1.
[83] *See Kasza*, 133 F.3d at 1159.
[84] *Id.* at 1170 (quoting Totten Adm'r v. United States, 92 U.S. 105, 107 (1875)).
[85] *Kasza*, 133 F.3d at 1173.
[86] *Id.* at 1170.
[87] *Id.* at 1163.
[88] *Id.* at 1172.
[89] *Id.*

disclosure requirements, as stated under RCRA § 3007(c)[90] and 3016(a),[91] were indeed violated, as noted by the district court.[92] Therefore, the EPA "obtained a Presidential exemption under RCRA § 6001(a)."[93] This presidential exemption,[94] however, was not entirely sweeping in its breadth. The exemption only applied to RCRA requirements that "would require the disclosure of classified information concerning that operating location to any unauthorized person."[95] Seemingly, this would require non-classified information to be given to the appropriate agency—the EPA—as required by RCRA because "[a]s a practical matter, the President's exemption relates in this case to RCRA's public disclosure requirement."[96]

Kasza also argued that this exemption did not apply to past requirements of disclosure of information to the EPA. The court accepted this argument, stating "[s]o far as [it could] tell, [the President] hasn't tried to do so."[97] The court placed the capstone on this litigation when it concluded that "remedial relief of the sort requested is moot" and that a remand to determine "the status of regulatory information for prior, unexempted years" would be "pointless," even though such a determination was the goal of the entire legal action.[98]

VI. IMPLICATIONS

Setting aside the multitude of environmental harms that could arise from un-checked waste disposal methods, the human damages that have already occurred will likely continue to develop for the unnamed plaintiffs in both cases.[99] Another ramification of the *Kasza* decision is that the Air Force does not have to comment on any of the allegations made by workers at the Groom Lake location that were not protected by the RCRA exemption because of the state secrets privilege.[100] Seemingly, as far as the Air Force is concerned, the Groom Lake base and all activities there simply did not exist. But to Kasza's widow:

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[90]42 U.S.C. § 6927 (2001).
[91]*Id.*
[92]*Kasza*, 133 F.3d at 1173.
[93]*Id.*
[94]Presidential Determination No. 95-45, 60 Fed. Reg. 52,823 (Oct. 10, 1995).
[95]*Id.*
[96]*Kasza*, 133 F.3d at 1173.
[97]*Id.* at 1174.
[98]*Id.*
[99]*See* Leiby, *supra* note 9, at F1.
[100]*See Kasza*, 133 F.3d at 1170.

> If, officially, Wally Kasza didn't work at Area 51 for seven years, then, officially, his death had nothing to do with his job. He didn't wake up with bloody pajamas from the fish scales, didn't hack his lungs out in the middle of the night kneeling next to the bed. Didn't get cancer. Didn't suffer so horribly that his son wanted to smother him with a pillow to end it all.[101]

Obviously, Kasza's and Frost's widows know that their husbands are indeed dead, and other workers at the Groom Lake location will likely suffer similar fates.[102]

The exemption President Clinton issued was subsequently re-issued each year while he was in office.[103] President Bush also issued an exemption during his first year in office.[104] With this in mind, it seems that these exemptions will continue to be issued from the White House, enabling the Air Force to avoid compliance with the RCRA disclosure requirements. If the Air Force does not have to comply with the RCRA disclosure requirements, then there is no guarantee that the disposal methods for waste materials will improve because disclosure of environmental compliance will not occur publicly, and the EPA is not allowed to discuss the contents of the inventory and inspection claims for—not surprisingly—reasons of national security.[105] Coupling this with the fact that there is still no check on the Air Force's ability to continue disposing of waste in whatever manner it sees fit, it is difficult to accept the protestations of the Air Force that "[w]e take our responsibility concerning protection of the environment seriously... protecting the environment and national security are not incompatible."[106] If the Air Force's assertions of environmental goodwill are not accepted, the decision by the *Kasza* court indicates that there remains little recourse.[107] The only other way to alter the practice of RCRA exemptions would be through political pressure, either upon Congress to change the scope of the presidential exemption, or upon the President himself.

The decisions of the *Kasza* court continue the trend of increasing reliance on the *Totten* doctrine and the state secrets

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[101] Leiby, *supra* note 9, at F1.

[102] *See id.*

[103] Presidential Determination No. 2000-30 (September 19, 2000); Presidential Determination No. 99-37 (September 20, 1999); Presidential Determination No.98-36 (September 25, 1998); Presidential Determination No. 97-35 (September 26, 1997); Presidential Determination No. 96-54 (September 28, 1996).

[104] Presidential Determination No. 2001-27 (September 18, 2001).

[105] *Kasza*, 133 F.3d at 1174.

[106] Jacobs, *supra* note 11, at A1.

[107] *See Kasza*, 133 F.3d at 1170.

privilege. "The state secrets privilege was invoked only five times between 1951 and 1970 [and] it has been invoked more than fifty times since 1971."[108] And "[w]hile the courts invoked the *Totten* doctrine only six times between 1875 and 1951, since 1951 it has been cited more than sixty-five times."[109] In the instant case, it is interesting to note that the court chose not to review the materials that comprised the "mosaic," which the Air Force claimed would expose state secrets at the district or appellate level.[110] Instead, the court did not fulfill "their constitutionally required mission - adequate review,"[111] and relied solely upon the assertions made by the Air Force. By doing so, the *Kasza* court chose to ignore the crimes perpetrated against the environment as well as the crimes against the individuals involved, simply in the name of secrecy. But, the "secrets" that the *Kasza* litigants needed in order to move their case forward were already known and of little value.[112] It seems the only thing really protected by the *Kasza* decision was the government's ability to keep secrets. The end result will be a "broadening of a principle that could block access to a whole range of information that should be available to the public."[113]

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[108]J. Steven Gardner, *The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 WAKE FOREST L. REV. 567, 584-85 (1994).

[109]Flynn, *supra* note 40, at 793.

[110]*See Kasza*, 133 F.3d at 1159.

[111]Flynn, *supra* note 40, at 806.

[112]*See* Jacobs, *supra* note 11, at A1.

[113]*Id.*